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No. 00-635

Supreme Court, U.S.
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In The

Supreme Court of the United States

FELICIA ANDERSON, as Special Administrator of the Estate of WAYNE ANDERSON, Deceased,

Petitioner,

v.

KEVIN SIMON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prosecutor's decision not to approve charges is entitled to absolute prosecutorial immunity.

2. Whether the court of appeals properly applied the correct legal standard in its evaluation of the sufficiency of plaintiff's complaint.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 217 F.3d 472 (7th Cir. 2000). The opinion of the district court (Pet. App. 12-13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2000. On July 5, 2000, petitioner filed a petition for rehearing and suggestion for rehearing en banc which was denied on July 20, 2000. The petition for a writ of certiorari was filed on October 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioner, Felicia Anderson, brought this suit on behalf of the decedent, Wayne Anderson, pursuant to 42 U.S.C. § 1983, against Kevin Simon, an Assistant Cook County State's Attorney (ASA). The court of appeals has succinctly set forth petitioner's version of events in the first three pages of its decision. (Pet. App. 1-3). In brief, petitioner asserts that Wayne Anderson confessed to a residential burglary but, when ASA Simon refused to charge him with felony burglary, he was detained overnight by the police. Wayne Anderson committed suicide in detention. *Id.*

The district court granted ASA Simon's motion to dismiss for three reasons. First, the court held that ASA Simon was entitled to absolute immunity as a prosecutor.

(Pet. App. 3-4, 13). Second, the court held that the failure of the jailors to prevent a known suicide risk was a superseding cause that absolved Simon. *Id.* Third, the court held that petitioner failed to plead a violation of Wayne Anderson's rights because he had not been held for forty-eight hours and petitioner had not pleaded sufficient complicating circumstances. *Id.*

The Court of Appeals for the Seventh Circuit affirmed. The court of appeals held that "Simon's decision not to approve charges against Wayne Anderson was entitled to absolute prosecutorial immunity." (Pet. App. 4). Because this holding resolved the case, the court explicitly stated, "we do not decide whether the forty-eight-hour rule was applied correctly or whether jailor negligence constituted a superseding cause to his death." *Id.*

ARGUMENT

I.

The court of appeals affirmed the dismissal of petitioner's complaint on the grounds that ASA Simon's decision not to approve charges against the decedent was entitled to absolute prosecutorial immunity. (Pet. App. 4). Applying the functional approach to prosecutorial immunity set forth in *Imbler v. Pachtman*, 424 U.S. 409 (1976), and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the court of appeals identified the determinative question: "whether the prosecutor was acting as an advocate in performing the task for which he is sued." (Pet. App. 6, citing *Buckley*, 509 U.S. at 274, *see also* Pet. App. at 5).

The court held, "Simon's refusal to charge Wayne Anderson given the evidence at his disposal is a prosecutorial decision." (Pet App. 7). The court reasoned that calculations regarding the sufficiency and weight of evidence "are a necessary part of a prosecutor's role as advocate in preparing for its presentation at trial or before a grand jury." *Id.* Noting that the decision to prosecute clearly falls within the ambit of absolute immunity, the court found no reason that a decision *not* to charge should be entitled to any less protection. *Id.*

This determination accords with this Court's precedent as well as with the decisions of other courts of appeals that have addressed the issue. *See, e.g., Imbler,* 424 U.S. at 431, n.33 (decisions regarding "whether and when to prosecute" fall within prosecutor's role as advocate for the State and are entitled to prosecutorial immunity); *Buckley v. Fitzsimmons,* 509 U.S. at 273 ("professional evaluation of the evidence assembled by the police" is among acts prosecutor undertakes in course of role as advocate for the State and is entitled to the protections of absolute immunity); *Roe v. City and County of San Francisco,* 109 F.3d 578, 583 (9th Cir. 1997) ("[W]e hold that a prosecutor is entitled to absolute immunity for the decision not to prosecute. [Citations omitted.]"); *Harrington v. Almy,* 977 F.2d 37, 41 (1st Cir. 1992) ("[G]iven the availability of immunity for the decision *to* charge, it becomes even more important that symmetrical protection be available for the decision *not to* charge. [Emphasis in original.]"); and *Oliver v. Collins,* 904 F.2d 278, 281 (5th Cir. 1990) ("The decision to file or not file criminal charges falls within [the] category of acts [that are an integral part of the judicial process] that will not give rise to Section 1983

liability. [Citations omitted.]"). Petitioner has pointed to no decision to the contrary.

Contrary to petitioner's assertions (Pet. 3-4), the court of appeals explicitly declined to decide whether the district court correctly applied the *Gerstein* forty-eight-hour rule. (Pet. App. 4). Thus, that issue is not properly presented in this petition. Petitioner's reliance on *Kalina v. Fletcher*, 522 U.S. 118 (1997), is also misplaced. (Pet. 4). The Court did not alter its approach to prosecutorial immunity, but rather applied its functional approach to the facts of that case. *Kalina*, 522 U.S. at 130 (prosecutor's act of testifying to facts was "the function of the witness, not of the lawyer" and thus not entitled to absolute immunity). The Court in *Kalina* explicitly stated, "[w]e do not depart from our prior cases that have recognized that the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate." *Id.* at 131 (citing *Imbler*, 424 U.S. at 431, *Buckley*, 509 U.S. at 273).

The decision of the court of appeals is correct and was predicated upon clearly established Supreme Court precedent. This Court's review is therefore not warranted.

II.

The court of appeals applied the correct legal standard in its evaluation of petitioner's complaint. The court stated, "[w]e review de novo the district court's grant of a 12(b)(6) motion, accepting the well-pleaded allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." (Pet. App. 4). The court

then applied the following standard: "[t]o survive a motion to dismiss . . . Felicia Anderson must plead facts that if true, would constitute a sec. 1983 violation." (Pet. App. 8, citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Petitioner's assertion that the court applied a pleading standard contrary to Federal Rule of Civil Procedure 8(a)(2) is also belied by the court's own language. (Pet. 6). As the court stated, "[f]ederal notice pleading requires only that the plaintiff 'set out in her complaint a short and plain statement of the claim that will provide the defendant with fair notice of the claim.' " (Pet. App. 5 (citation omitted)). This statement is drawn directly from *Conley v. Gibson*, 355 U.S. at 47. *See also Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993) (reaffirming statement in *Conley* of notice pleading).

Finally, contrary to petitioner's assertion that the court applied a more exacting pleading standard in this case (Pet. 6), the court gave petitioner's complaint a "generous interpretation." (Pet. App. 8). It went beyond the statements made in petitioner's complaint and considered the statements made in petitioner's response to ASA Simon's motion to dismiss. (Pet. App. 6). The court concluded that "[e]ven under this *generous interpretation* of Felicia Anderson's complaint," she failed to plead facts that if true would constitute a sec. 1983 violation. (Pet. App. 8 (emphasis added)).

Petitioner raises no substantial legal issue. Rather, she disagrees with the application by the court of appeals of the correct legal standard to her statement of her claim in this case. Petitioner's fact-bound objections to the

appellate court's decision do not merit this Court's review.[1]

III.

Finally, there are two alternative grounds that support the dismissal of petitioner's complaint. First, the district court held that the police department's failure to prevent a known suicide risk was a superseding cause. (Pet. App. 13). Second, the district court held that Wayne Anderson had not been held for forty-eight hours and that petitioner had not pleaded sufficient complicating circumstances to allege a violation of Wayne Anderson's Fourth Amendment right to a prompt judicial determination of probable cause. *Id.* The court of appeals explicitly stated that it did not consider either of these grounds because its absolute immunity holding resolved the case. (Pet. App. 4). Because the district court's dismissal of petitioner's complaint could be affirmed on either of these alternative grounds, this case does not lend itself to review by this Court.

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[1] This case involves no allegation of First Amendment retaliation. *See* Pet. App. 1-3. Thus, the cases petitioner cites regarding the elements of a retaliation claim are inapposite. (Pet. 5, n.1).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER 14, 2000